

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



STANISLAUS CONSOLIDATED
FIREFIGHTERS, LOCAL 3399,

Charging Party,

v.

STANISLAUS CONSOLIDATED FIRE
PROTECTION DISTRICT,

Respondent.

Case No. SA-CE-711-M

Administrative Appeal

PERB Order No. Ad-392-M

January 19, 2012

Appearance: Law Offices of William D. Ross, Attorney, for Stanislaus Consolidated Fire Protection District.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on an administrative appeal of the PERB Appeals Assistant's determination that the Stanislaus Consolidated Fire Protection District's (District) response to the appeal of the partial dismissal of the unfair practice charge was untimely filed.

The Board has reviewed the Appeals Assistant's determination and the record in light of the District's administrative appeal and the relevant law. Based on this review, the Board does not find good cause to excuse the late-filed response to the appeal.

BACKGROUND

Pursuant to PERB Regulation 32635, subdivision (a),¹ the Stanislaus Consolidated Firefighters, Local 3399 (Local 3399) timely filed an appeal of the Board agent's partial

¹ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

dismissal on August 10, 2011. Under subdivision (c), any other party may file a statement in opposition to the appeal within 20 days following the date of service of the appeal. Under this regulation, the District's response to the appeal was due to be filed no later than August 30, 2011. The District filed its response on September 7, 2011, eight days late. The District stated in its response:

It is acknowledged that submission of this response is late, however we would note that PERB Regulations are directory as opposed to mandatory. [Citations omitted.] This office respectfully requests that the PERB accepts this late filing because a portion of the PERB decision warrants clarification, . . . Additionally, consideration of this response does not prejudice the Local. [Citations omitted.]

By letter dated September 13, 2011, the Board's Appeals Assistant informed the District that its response to the appeal was untimely and that the District could appeal the timeliness issue to the Board itself under PERB Regulation 32360 governing appeals of administrative decisions. On September 28, 2011, the District timely filed an administrative appeal of the Appeal Assistant's administrative decision, reiterating arguments advanced in its initial response.²

DISCUSSION

PERB Regulation 32136 provides as follows:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

² The District also requested that "the Board accept its response consistent with PERB Regulation 32410 because, among other things, the Partial Dismissal contains prejudicial errors of fact that require clarification and correction." PERB Regulation 32410 governs requests for reconsideration of a decision of the Board itself. The District's appeal of the timeliness issue is taken from an administrative decision of a Board agent, and not from a decision of the Board itself. As stated in the Appeal Assistant's letter of September 13, 2011, the District's appeal is governed by PERB Regulation 32360, not PERB Regulation 32410.

Thus, pursuant to PERB Regulation 32136, the Board may, in its discretion, excuse a late filing for good cause. The Board has found good cause to exist where the explanation for the delay was “reasonable and credible.” (*Barstow Unified School District* (1996) PERB Order No. Ad-277 (*Barstow*)). The Board has also found good cause to exist for “honest mistakes” such as mailing or clerical errors. (*Ibid.*) Good cause has been found to exist where a short delay resulted from circumstances beyond the control of the filing party or from excusable misinformation. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325 (*Kestin*)). Good cause has also been found to exist where the filing party’s explanation was either credible on its face or corroborated by other facts or testimony. (*Ibid.*) Good cause exists only where the filing party has made “a conscientious effort to timely file.” (*Ibid.*) If the reason for the untimely filing is “reasonable and credible,” the Board then evaluates whether permitting a late filing would be prejudicial to the opposing party. (*Barstow*.)

Here, the District filed its response to the appeal eight days late. It is impossible for the Board to determine whether the District’s reasons for the late filing are reasonable and credible, because no reasons were given.³ It is unknown whether the District made an honest mistake or whether the delay resulted from circumstances beyond the District’s control or from excusable misinformation. As there is no information upon which to evaluate whether the

³ The District asserts that it was served with an incomplete copy of the appeal and that it did not receive a complete copy until the next day, August 11, 2011. If the District was disadvantaged by this one day delay, it had the duty to request an extension of time under PERB Regulation 32132. Under this regulation, a request for an extension of time must be filed at least three days prior to the expiration of the time required for filing. Extensions of time may be granted by the Board for good cause. The District had ample time within which to request an extension but no request was made. The District also asserts that it did not receive a copy of the exhibits referenced in the appeal. The exhibits referenced in the appeal appear to be exhibits to the original unfair practice charge filed on February 9, 2011, not to the appeal itself.

District made a conscientious effort to timely file its response to the appeal, the District's request that the Board accept its late filed response must be denied.

The District argues that there is no prejudice to the opposing party. Even if no prejudice can be inferred from the lack of any opposition to the District's request, prejudice is only one part of the equation. Without the opportunity to evaluate whether the District's reasons for the late filing are "reasonable and credible" under the standards set forth above, the Board cannot find good cause to exist based on lack of prejudice alone. The cases cited by the District are of no avail. *Coronado Unified School District (Goodman)* (1989) PERB Order No. Ad-188 (*Goodman*) involved an appeal from a denial of a request for an extension of time to file exceptions to a proposed decision. Requests for extensions of time are also decided under a good cause standard. (PERB Reg. 32132.) The charging party's stated reason for the late filing was that her attorney would be out of town until the last day for filing. In the absence of detailed information from the charging party concerning counsel's unavailability, the Board found charging party's reason for the late filing insufficient and affirmed the denial of her request for extension.⁴ This decision does not support the District's argument. In *Goodman*, the filing party provided the Board with a possible basis upon which to find good cause, which was nonetheless found to be insufficient. Here, the District provides the Board with no possible basis.

The District relies on the dissent in *Goodman* and on two appellate opinions⁵ for the principle that PERB's regulations are directory or directional as opposed to jurisdictional.

⁴ The District cites a number of decisions involving irregularities in compliance with service of process requirements. These decisions are inapposite to the issue presented.

⁵ *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1132 (*San Diego*); and *Californians for Population Stabilization v. Hewlett Packard Company* (1997) 58 Cal.App.4th 273, 284.

That the expiration of a PERB timeline has not been construed as stripping PERB of jurisdiction to hear the underlying case does not negate the requirements contained in PERB's regulatory scheme. PERB Regulation 32136 governing late filings is unambiguous. Whether to accept a late filing is discretionary. Discretion resides with the Board. The Board is authorized to exercise its discretion only upon a demonstration of good cause.

The District relies on *Modesto Irrigation District* (2006) PERB Decision No. 1856-M (*Modesto*) for the principle that "good cause" is a flexible standard, which is defined and constrained by considerations of fairness and reasonableness. As here, *Modesto* involved a response to an appeal of a dismissal, filed eight days late with a request that it be accepted as timely filed. The stated reasons for the late filing were twofold. The filing party was anticipating an additional notice from PERB setting forth the timelines; and a key employee critical to crafting a complete response was on an extended leave of absence. The facts in *Modesto* are no different than the facts here, except the filing party in *Modesto* proffered two possible bases upon which to support a finding of good cause. The Board rejected both, stating that the filing party did not adequately explain how it was prevented from making a conscientious effort to timely file its response. While "good cause" may be a flexible standard, it is not so flexible as to lose all meaning.

The District also relies on *Kestin*, which involved a late-filed appeal of a dismissal. The filing party asserted that the dismissal was lost in the mail but failed to substantiate that assertion through declarations of third parties or other evidence. The Board found that the filing party made no conscientious effort to timely file and therefore concluded that there was no good cause to excuse the late filing. The consequences in *Kestin* were severe. The appeal

could not be heard. Here, notwithstanding the Board's denial of the District's request that its late-filed response be excused, the appeal proceeds.⁶

Barstow is the only case cited by the District in which the Board found good cause to excuse a late filing. *Barstow*, however, involved an inadvertent error, which caused an otherwise timely response to be filed in the wrong PERB office. By the time that office forwarded the filing to the correct PERB office, it was two days late. The facts of this case bear no resemblance to the facts in *Barstow*.

Finally, the District claims that its response to the appeal is critically needed to clarify whether Section 20-2 of the memorandum of understanding exists in the successor agreement. All that is before the Board at this juncture is the timeliness of its response.

Based on the foregoing, the District's request that the Board excuse its late-filed response to the appeal is hereby denied.

ORDER

The request by the Stanislaus Consolidated Fire Protection District that the Public Employment Relations Board excuse its late-filed response to the appeal of the partial dismissal of the unfair practice charge in Case No. SA-CE-711-M is hereby DENIED.

Members Dowdin Calvillo and Huguenin joined in this Decision.

⁶ The District relies on *San Diego* in making the following argument: "Where a regulation is directory, there is strong public policy in favor of **hearing** appeals on the **merits** [sic] operates against depriving an aggrieved party or attorney of a **right to appeal** because of noncompliance with technical requirements." (Bold in the original.) The appeal here concerns a partial dismissal of Local 3399's allegations. Local 3399 is the aggrieved party, not the District.